Filed 4/17/19 WSI Highland Investments, LLC v. Traigh Etiwanda Associates, LLC CA4/3
(unmodified opinion attached)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

WSI HIGHLAND INVESTMENTS, LLC et al.,

Plaintiffs, Cross-defendants, and Appellants,

v.

TRAIGH ETIWANDA ASSOCIATES, LLC et al.,

Defendants, Cross-complainants, and Respondents;

PW ETIWANDA ASSOCIATES, LLC,

Defendant and Respondent.

G055839, consol. w/ G056060

(Super. Ct. No. 30-2015-00827409)

ORDER MODIFYING OPINION AND DENYING REHEARING; NO CHANGE IN JUDGMENT

Appellants filed a petition for rehearing on April 2, 2019. Respondents filed an answer to the petition on April 10, 2019. It is ordered that the opinion filed herein on March 18, 2019, be modified as follows:

The first full paragraph on page 24 beginning with "Richland contends . . . " is deleted. Replace that paragraph with the following two paragraphs:

Richland contends the trial court's "Award of $6,111,111 to Tracy . . . Results In An Excessive Recovery" on Tracy's cross-complaint. Richland argues that Tracy's damages, if any, were limited to $25,000 in liquidated damages under the CPA. The liquidated damages provision called for forfeiture of the buyer's escrow deposit ($25,000) if the buyer (Richland) terminated the sale after escrow opened. But Richland cannot invoke in its defense a contract term that became inapplicable through Richland's own breach. (Civ. Code, § 3517 ["No one can take advantage of his own wrong"].) The liquidated damages provision on which Richland relies did not nullify Richland's express cooperation agreement and good faith and fair dealing obligation to complete the parcel transfer, as discussed. Richland suggests the liquidated damages provision limited Tracy's damages for *any* breach by Richland, but the $6.1 million contingency reduction in the Stage 1 Note did not include the $25,000 limitation, a negligible sum compared to the $6.1 million at stake. Moreover, the parties' Stage 1 and Stage 2 remedies are not mutually exclusive. To the contrary, Richland cannot complain that the trial court did not enforce *both* remedies by denying Richland the $6.1 million note reduction in Stage 1 *and* requiring Richland to pay $25,000 for thwarting the close of escrow in Stage 2.

Richland in a rehearing petition suggests it had additional reasons to reject the sale Tracy arranged for the District to convey the parcel directly to Richland, beyond the purported absence of a 10-day review period in the District's proposed transfer—which Justice Aronson demonstrated in his concurring opinion was inaccurately asserted. These new arguments are forfeited for failure to raise them until now. If they were raised below, Richland's decision to go "dark" rather than meeting its cooperation and good faith obligations to complete the sale supports the trial court's judgment. Moreover, none of the asserted risks Richland now identifies in completing the sale through the District instead of directly from Tracy undermines the trial court's conclusion that a strawman purchase by Richland from the District on Tracy's behalf would have satisfied both Richland's cooperation obligations and its insistence it was entitled as a condition

precedent to obtain the parcel from Tracy. As the trial court reasonably could conclude, under an initial strawman transfer vesting the parcel's legal title in Richland, Tracy would bear any risks before transferring equitable ownership to Richland. In sum, the parties' mutual mistake in failing to realize the District could only transfer the remaining parcel to a contiguous landowner did not give Richland a license—once it obtained the contiguous properties—to breach the parties' multimillion dollar agreement.

This modification does not effect a change in the judgment.

The petition for rehearing is DENIED.

GOETHALS, J.

WE CONCUR:

ARONSON, ACTING P. J.

IKOLA, J.

Filed 3/18/19 WSI Highland Investments, LLC v. Traigh Etiwanda Associates, LLC CA4/3 (unmodified opinion)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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G055839, consol. w/ G056060

(Super. Ct. No. 30-2015-00827409)

O P I N I O N

Appeal from a judgment and postjudgment order of the Superior Court of Orange County, Sheila Fell, Judge. Affirmed.

Rutan & Tucker, Lisa N. Neal, Gerard M. Mooney and Allina M. Amuchie for Plaintiffs, Cross-defendants, and Appellants.

Allen Matkins Leck Gamble Mallory & Natsis and Thomas E. Gibbs; Scheppach Bauer and Brian R. Bauer for Defendants, Cross-complainants, and Respondents.

* * *

WSI Highland Investments, LLC (WSI) and Richland Real Estate Fund, LLC (collectively Richland) appeal from the trial court's judgment in favor of Tracy Etiwanda Associates, LLC (Tracy Etiwanda), Traigh Etiwanda Associates, LLC (Traigh), and PW Etiwanda Associates, LLC (collectively Tracy) on Richland's complaint for declaratory relief and Tracy Etiwanda and Traigh's cross-complaint for declaratory relief, reformation, and judicial foreclosure.

Richland's principal claim at trial was that it was entitled to a $6 million principal reduction on a $23 million promissory note it gave Tracy as part of a complicated $38 million real estate transaction. For its part, Tracy offered substantial extrinsic evidence suggesting that Richland breached the terms of the note and the underlying, interlocking contracts—including various cooperation clauses and the covenant of good faith and fair dealing—thereby preventing closing on the second stage of the transaction and frustrating the purpose of the parties' agreement. Tracy claimed Richland attempted to turn an unexpected development to its advantage to justify its failure to perform the entire contract.

In the consolidated appeal, Richland also seeks reversal of the court's post-judgment order for $1.7 million in contractual attorney fees awarded to Tracy, in the event we overturn the judgment. As we explain, because the guiding principles governing contract interpretation and the standard of review on appeal support the trial court's interpretation of the parties' mutual intent at the time of contracting, we affirm the judgment and the attorney fee order.

FACTUAL AND PROCEDURAL BACKGROUND

Drawn largely from the trial court's thorough statement of decision, we set out the relevant background in the light most favorable to the judgment below, as required by the standard of review. (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 229; *Yale v. Bowne* (2017) 9 Cal.App.5th 649, 652.) Under well-established appellate principles, "'All of the evidence most favorable to the respondent must be accepted as true, and [any that is] unfavorable discarded as not having sufficient verity to be accepted by the trier of fact.'" (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 370, pp. 427-428.)

1. *The Parties' Purpose for the Underlying, Integrated Land Tract*

Summarized by the trial court, the purpose of the parties' contracting efforts was for Richland to gain "complete . . . ownership of Tract 14749, in return for which Tracy's benefit is receiving the full agreed purchase price . . ." so that homes could be built on the property. The tract consists of three separate undeveloped parcels in San Bernardino County (County) totaling more than 100 acres, together with all necessary entitlements Tracy gained from the City of Rancho Cucamonga on "Tract Map 14749" to integrate the parcels and develop 269 residential lots. Of the three parcels, two were owned by Tracy, one 77.95 acres (Map 1 Parcel) and the other 8.9 acres (Map 2 Parcel). The third parcel, which gave rise to the unforeseen circumstances which hindered Tracy's sale of the entire tract to Richland, and which is the focus of the current litigation, was a 17.46-acre parcel (District Property) owned by the San Bernardino County Flood Control District (District). Tracy's entitlements for the development of the entire tract included, and were dependent upon, the District Property being included as a part of Tract Map 14749.

2. *The Parties Reach Agreement on Deal Terms in June 2014*

In April 2014, Richland, a neighboring landowner, made an unsolicited offer to Tracy to purchase all property and entitlements included in Tract Map 14749. Richland made clear that it needed to complete the purchase by September 30, 2014, in order to qualify for favorable tax treatment under Internal Revenue Service (IRS) regulations (section 1031 exchange) for reinvesting the proceeds of an earlier transaction not involving Tracy. Tracy was already negotiating with the District to acquire the District Property.

By late June 2014, Richland and Tracy reached agreement on terms for Tracy to sell Richland all parcels in Tract Map 14749, including a fourth parcel necessary for environmental mitigation (the Mitigation Parcel), and all of Tracy's tract entitlements. The purchase price was $38,736,000. Of this total, the agreement allocated approximately $30 million to the Map 1 parcel, including a secured promissory note for $23,672,000 (Note). The purchase was contingent on Tracy acquiring the District Property, which the parties expected to occur within two months. Richland prepared a single purchase-sale agreement (PSA), which, when the deal was modified to a sale of separate parcels in two stages, it used as a template for four separate PSAs, one for each parcel.

3. *The Parties Agree to a Staged Sale in August 2014*

Nothing initially suggested the District could not complete the sale of the District Property to Tracy as scheduled. But by August 2014, the parties knew the County's review under the California Environmental Quality Act (CEQA) would delay the District's sale of its parcel to Tracy beyond Richland's September 30th deadline.

At Richland's urging, the parties cooperated to overcome this issue. In a letter dated August 18, 2014, Richland proposed "splitting the acquisition" into a two-stage sale. In Stage 1, to be completed before its September IRS deadline, Richland

would purchase Tracy's in-hand properties: the Map 1 Parcel, Map 2 Parcel, and Mitigation Parcel (the Transferred Parcels), along with all Tract Map 14749 entitlements. Then, in Stage 2, Richland would purchase the District Property once Tracy acquired it from the District. Richland's August letter specifically stated its intention both to "move forward on acquiring just the owned property now and the balance when you acquire it from [the District]." Richland's letter allocated $10 million of the total planned purchase price to the Stage 2 acquisition.

In a letter dated August 20, 2014, Tracy agreed to the staged sale on the following terms: (1) Tracy "will have eighteen (18) months from the date of the close of escrow [on Stage 1] to acquire and sell the flood control property to you [i.e., the District Property]," (2) the purchase price for the District Property would be $3,888,889, (3) the $23,672,000 Note would be subject to a $6,111,111 principal reduction if Richland did not acquire the District Property within that 18 months (later extended to two years), and (4) "[t]he parties will cooperate with each other on the acquisition of the flood control property."

4. *The Revised Note and PSAs, Signed in September 2014*

On August 25, 2014, Richland's counsel sent revised versions of the Note and PSAs to Tracy to reflect the staged sale. The trial court found that the "Note and the PSAs were drafted under the assumption that Tracy would and could acquire the District Property directly from the District." On September 8, 2014, the parties executed four PSAs. One for the Map 1 Parcel, one for the Map 2 Parcel, and one for the Mitigation Parcel in Stage 1, with the Note allocated to acquisition of the largest parcel. A fourth PSA for Richland's Stage 2 acquisition of the District Property once Tracy obtained it from the District was additionally executed. The parties referred to the fourth PSA as the Conditional Purchase Agreement (CPA).

The parties closed escrow on the Transferred Parcels, completing Stage 1 of their agreement, on September 24, 2014. The trial court found that Richland, before closing, "conducted and completed due diligence on *all* the property comprising Map Tract 14749[,] including the District Property." (Italics added.) At closing, Richland delivered the $23,672,000 Note to Tracy along with a trust deed securing it, which Tracy recorded.

As the trial court highlighted in its statement of decision, the Note contains language added by Richland's counsel regarding the importance to Richland of obtaining the District Property. That language specified the meaning of the Note's principal reduction provision, as follows: "'the principal amount of this Note shall automatically be reduced by an amount equal to . . . $6,111,111 ("Partial Principal Reduction") in order to compensate Maker [i.e., Richland] for the loss in value to the remaining lots that comprise Tentative Tract No. 14749 . . . .'" Specifically, Section 3.05 of the PSA for the Map 1 Parcel provides for what the parties termed a "Note Reduction Contingency" of $6.1 million if Richland did not receive the District Property by the "Outside Date" of two years from closing on Stage 1. The Note Reduction Contingency provided that Richland "shall have no right to the Partial Principal Reduction" once it owns the District Property.

In addition to the foregoing timeline of events, the trial court's statement of decision includes its findings related to several provisions in the CPA for Richland's acquisition of the District Property. The court found the CPA obligated Tracy to use '"commercially reasonable efforts' to acquire the District Property 'as soon as reasonably possible.'" The CPA provided a 10-day review period before close of escrow on the District Property, once Tracy obtained it. The court found the parties "intended" the review period *not* as a unilateral right of cancellation for Richland, but rather "to address any material changes to the property or title, none of which were likely on this undeveloped land."

Addressing termination rights spelled out in the CPA, the court found that Section 2.06 provided "that if escrow does not close by the two-year Outside Date, the parties shall 'each have the right . . . to terminate this Agreement,' which the Court f[ound] reflects that (1) prior to the two years expiring, Richland had no termination right, and (2) if the District Property is acquired from the District within that two-year period, Richland has the obligation to close, i.e., purchase the District Property."

Additionally, the trial court found that the CPA "imposes cooperation obligations on the parties to resolve unforeseen problems," including: "(1) Section 1: 'Buyer [Richland] shall . . . cooperate with Seller [Tracy] in Seller's efforts to acquire the Property," and (2) Section 13.11: 'Each of the parties shall execute such other and further documents and do such further acts as may be reasonably required to effectuate the intent of the parties . . . ." The court found that "the parties' intent was for Richland to acquire the District Property to complete its ownership of Tract Map 14749 and thereby avoid the 'loss in value' to the remaining lots that comprise Tentative Tract No. 14749 for which the $6,111,111 principal reduction was to 'compensate' as provided in the Note."

5. *The Unforeseen Event—the District Must Sell to an Adjoining Landowner*

Although negotiations to complete the District's sale of the District Property to Tracy continued during the period leading up to the completion of Richland and Tracy's Stage 1 agreement, it was only after the Stage 1 closing that District personnel disclosed a crucial restriction. On September 30, 2014, days after the Stage 1 closing, Kevin Blakeslee, a District public works official, sent Tracy an e-mail stating that the sale to Richland '"really complicates things'" because Tracy's right to acquire the District Property, and the District's ability to sell the District Property to Tracy, depended on the fact "that Tracy was the only contiguous property owner.'" Blakeslee concluded in his e-mail, "[a]t this point I am not sure if it's possible to proceed with

selling directly to Tracy." Blakeslee subsequently confirmed the District could not sell the District Property directly to Tracy because Richland, not Tracy, now owned the land adjoining the District Property.

6. *The Parties Cooperate to Resolve the Problem*

On October 3, 2014, Tracy principals Randy Luce and John Abel met with Richland's Senior Vice President, John Schafer. Luce and Abel suggested that Richland buy the District Property directly from the District with "the economics" of the transaction remaining unchanged. As the trial court explained in its statement of decision, this meant that "(1) Richland would not pay more than the $3,888,889 price under the CPA, with Tracy picking up any difference, and (2) there would be no principal reduction in the Note as Richland would own the District Property, thereby avoiding the 'loss in value to the remaining lots that comprise Tentative Tract No. 14749.'"

On October 6, 2014, Luce emailed Schafer, asking: "Have you had a chance to think about the Flood Control process. We would like to get back to Kevin Blakeslee and keep the ball rolling . . . and want to make sure you are comfortable with our proposed solution." Responding by e-mail, Schafer stated, '"I'm not sure what else we can do.'" Schafer also spoke on the phone with Abel, confirming that Richland agreed to cooperate in continuing to acquire the District Property. The court found in its statement of decision "that Schafer had actual and ostensible authority to accept Tracy's proposal on behalf of Richland," which the court referred to as "the Mutual Agreement" for "Richland to acquire the District Property directly from the District, with the same economics."

Although the trial court referred to these developments as a mutual agreement, the court also found that they represented "the implementation and fulfilment of the parties' express and implied cooperation obligations described above, rendering that agreement part and parcel of the Note and the CPA." In other words, the court found

Richland's eventual "breach of the Mutual Agreement constitutes breaches of its cooperation obligations under the Note and CPA which excuses the Note Reduction Contingency and precludes the principal reduction."

Alternatively, observing that Richland "repeatedly affirmed the Mutual Agreement orally, in writing and in its course of conduct," the court also found it "enforceable as a standalone agreement . . . ."

7. *The Parties Pursue Richland's Direct Acquisition of the Property*

Returning to its chronological account, the trial court in its statement of decision next recounted that Tracy, as the former lead in obtaining the District Property and still intent on seeing the acquisition through, "initiated the process for the direct sale to Richland." Abel sent Blakeslee an e-mail stating: "We . . . feel that the best solution would be to have the new Richland entity be the party to the agreement." The District agreed, confirming in a letter on December 1, 2014, that it would sell the District Property to Richland. This led to a December 9 meeting between Richland, Tracy, and District personnel at which Schafer confirmed that a Richland entity, WSI, would be the buyer. The parties also discussed the status of the County's CEQA review and other steps for completing the sale to WSI.

Tracy and its land use attorney worked to resolve the CEQA issue and complete the District's sale directly to Richland, all at Tracy's cost. On January 16, 2015, Luce e-mailed Schafer both a status memo regarding the CEQA issue and a revised purchase agreement (Transfer Agreement) between the District and Richland for the District Property, substituting WSI as the buyer, as directed by Richland.

On March 9, 2015, Tracy's land use attorney e-mailed a positive status report to Schafer, Luce, and Abel, stating there were '"[n]o overly problematic issues"' and that "the County [was] 'aiming for a July hearing before the Board' on the direct sale to WSI."

8. *Richland's Repudiation and then Resumption of Performance*

On April 16, 2015, Richland sent a letter to Tracy, purporting to repudiate the Mutual Agreement. Then on May 28, 2015, Richland's owner, John Bray, met with Tracy's principals Luce and Abel, who reported progress on the CEQA issue and that the County was reappraising the District Property, which could impact the price. The trial court found that after this meeting, "The parties resumed working together to complete Richland's acquisition" of the District Property.

9. *Richland's Breach*

On August 12, 2015, the County sent an e-mail to the parties advising that the District was ready to complete the sale of the District Property to Richland. The purchase price remained $3,888,889, the same price as under the CPA. The County enclosed the Transfer Agreement on the same substantive terms previously sent to Richland. The trial court found in its statement of decision, "There are no material differences between Richland acquiring the District Property through the CPA or the Transfer Agreement."

And then things changed. As the trial court observed, "Richland did not proceed to purchase the District Property," but "instead Richland went 'dark.'" Richland did not flag any problems with the Transfer Agreement or the District Property and took no steps to identify or cooperate in resolving potential issues. The court found Richland simply "did not respond to the County's August 12, 2015 email and Transfer Agreement, and ignored the County's many follow up emails to Richland in 2015 and 2016."

The trial court said in its statement of decision that "[t]he evidence shows that while the County desires to sell the District Property, Richland has chosen thus far not to proceed with its acquisition. There also is evidence that Richland intends to acquire the District Property to complete Tract Map 14749 . . . ." The court noted Richland applied for and obtained from the City the requisite extension to maintain the

validity of "Tract Map 14749" for development. The court also found: "The evidence showed that (1) the District Property is needed by Richland to complete Tract Map 14749, (2) Richland effectively is the only buyer (it is unlikely that a third party would buy such a landlocked parcel with entitlements being owned by Richland), (3) the District desires to sell the District Property to Richland, and (4) Richland can and is likely to buy the property once this litigation is over, totally eliminating the loss for which the $6,111,111 was to compensate."

Based on the foregoing, the trial court concluded, "Richland's failure to promptly proceed with acquiring the District Property and complete the staged acquisition after receiving the County's August 12 e-mail, breached its obligations under the Note, the CPA and the Mutual Agreement." The court also found that "as a result of those breaches, the Note Reduction Contingency under the Note was excused, which eliminated the $6,111,111 principal reduction and resulted in the increase in the interest rate under the Note from 3.71% to 5%, effective on the date of the breach, which the Court finds occurred no later than December 14, 2015." Specifically, the Note authorized a reduced interest rate of 3.71 percent until Richland gained control of the entire Tract Map 14749 in Stage 2, at which time the interest rate increased to 5 percent. In determining the date of the breach to be a date no later than December 14, 2015, the court reasoned that four months from the date of the County's e-mail enclosing the Transfer Agreement was ample time to complete the sale.

Tracy advised Richland by a letter dated December 17, 2015 that it deemed the increased interest rate on the Note to be triggered by Richland's failure to complete the District Property sale. Tracy enclosed an invoice with the letter for the quarterly interest payment at 5 percent that was due on January 1, 2016. When Richland failed to pay the increased interest amount, Tracy sent Richland a notice of default under the Note and trust deed, and accelerated the Note. As these events were unfolding, the parties went to court to resolve their differences.

10. *Lawsuit, Counterclaim, and the Trial Court's Rulings*

On December 29, 2015, Richland filed a complaint seeking declaratory relief primarily, as the trial court explained in its statement of decision, to enforce the $6,111,111 principal reduction for Tracy's failure to obtain and convey to Richland the District Property. On February 23, 2016, Tracy Etiwanda and Traigh filed a cross-complaint seeking, among other things, declaratory relief that, as the court recounted: "(1) Richland breached its express and implied obligations under the Promissory Note, the CPA, and/or the Mutual Agreement, including by refusing to cooperate to acquire the District Property from the District, and (2) as a result of those breaches, and as an unenforceable penalty, Richland is not entitled to the $6,111,111 principal reduction." The cross-complaint also sought judicial foreclosure for Richland's uncured default on the Note, as well as reformation to correct a mistake in the CPA regarding Richland's alleged termination rights.

The matter proceeded to trial. After extensive testimony and the admission of hundreds of exhibits, the trial court ruled in favor of Tracy and against Richland on the complaint and cross-complaint.

Specifically, the trial court found "Richland breached its good faith obligation under the Note by failing to cooperate and proceed to purchase the District Property. Richland's breach of its good faith obligation results in the Note Reduction Contingency being excused, eliminating the $6,111,111 principal reduction."

In addition to breach of the Note, the trial court found "Richland's breach of its express and implied cooperation obligations under the CPA precludes it from obtaining [] the principal reduction." (Formatting adjusted.) The court explained: "CPA Sections 1 and 13.11 impose broad cooperation obligations on Richland to overcome unforeseen problems to effectuate the parties' intent that Richland acquire the District Property. When the unforeseen event occurred—the District's disclosure that it could only directly sell the District Property to the adjacent owner Richland, not Tracy—those

cooperation obligations were triggered." Supplementing "Richland's express cooperation obligations," the court also found "the implied good faith covenant under the CPA required Richland to do everything that the CPA presupposes it will do to accomplish its purpose." Consequently, the good faith covenant "obligate[d] Richland to directly acquire the District Property from the District, with the same economics."

In sum, in light of the testimony it heard and the exhibits admitted concerning the parties' intent leading up to the Stage 1 closing, and what the court called the parties' "Mutual Agreement" to see the sale through to its completion, the court found a cooperation obligation that was essentially "part and parcel of the Note and the CPA." The court also found the $6.1 million principal reduction term dramatically exaggerated Richland's actual harm if Richland did not obtain the District Property from Tracy, and therefore constituted an unenforceable liquidated damages penalty.

The trial court rejected Richland's claim that it had absolute termination rights under the CPA which allowed Richland to decline to proceed with Stage 2. The court concluded that while "Richland relied on language in Section 5.03 of the CPA . . . for the right to terminate the CPA in its sole discretion at any time, including the next day after the Stage 1 transaction closed . . . ," "this was not the intent of the parties . . . ." In reaching this conclusion, the trial court pointed to contradictory language in the CPA, which the court found rendered it ambiguous. Specifically, the court observed that "Section 5.03 conflicts with Section 2.06 of the CPA" because the latter "gives the parties termination rights *only after* Tracy has had its two years to complete the Stage 2 sale of the District Property." (Original underscore, italics added.)

As we discuss more fully below, in addition to the internal inconsistency in the CPA language regarding termination rights, the trial court also focused on "[w]itness testimony showing the language [in Section 5.03 was mistakenly] carried over from the prior form draft PSA . . . for the sale of the entire Tract 14749 property at the same time." Considering this testimony along with other extrinsic evidence, including the parties' pre-

and post-Stage 1 negotiations and conduct, plus the "unfair absurdity" of allowing Richland to ignore the purpose of the parties' contracting efforts, and then to "turn around and itself purchase the District Property from the District," the court concluded Tracy was entitled to reformation of the CPA based on mutual mistake of the parties. The court also concluded "Tracy is entitled to reformation . . . to eliminate the language mistakenly left in Section 5.03" based on Tracy's unilateral mistake.

Finally, based on Richland's breach of the Note and failure to pay the resulting sums "immediately due and payable," the trial court granted Tracy's request for a declaration it was entitled to foreclose on the trust deed securing the Note.

Richland now appeals.

DISCUSSION

Richland's principal claim is that the trial court erred when it ignored the plain language in the "sophisticated" parties' "heavily negotiated" written agreements, including Richland's right to terminate the CPA, which it exercised.[1] Richland relies on basic contract principles which dictate that courts have "no power to make [] new contract[s] for the parties" (*Heath v. Kettenhofen* (1965) 236 Cal.App.2d 197, 207) and may not insert "new substantive rights [in a contract] under the guise of doing equity." (*Wal-Noon Corp. v. Hill* (1975) 45 Cal.App.3d 605, 613.) Richland argues it had no obligation to purchase the District Property directly from the District, but rather, under the unambiguous terms of the parties' contracts, that duty rested with Tracy. Based on

[1] Richland's opening brief asserts Tracy made a binding judicial admission in its cross-complaint that Richland *validly* invoked its right of termination in Section 2.06 on September 26, 2016, two years and two days after the parties closed on Stage 1, and therefore within the termination period contemplated by Section 2.06. As Tracy points out in its respondents' brief, and Richland concedes in its reply, Tracy made no such concession, having filed its cross-complaint seven months *before* Richland purported to terminate the CPA under Section 2.06.

Richland's right of review and termination options, Richland argues it had the right, but no responsibility, to then purchase the property *from Tracy* and no one else.

Put another way, Richland asserts Tracy's acquisition of the District Property was a condition precedent to Richland performing its payment and closing obligations to complete Stage 2 under the CPA. Richland also argues a $25,000 liquidated damages provision in the CPA supports its absolute right to terminate that contract and limits Tracy's damages to—at most—that amount. According to Richland, Tracy's "excessive recovery" of $6.1 million through non-enforcement of the Note's principal reduction term awards Tracy an unwarranted, "enormous windfall."

Central to Richland's position is its view that the CPA contains no ambiguity and, therefore, must be interpreted according to its "'clear and explicit'" terms, without resorting to extrinsic evidence regarding the parties' intent. We cannot agree.

Richland recognizes that """'[t]he fundamental rules of contract interpretation are based on the premise that the interpretation of a contract must give effect to the 'mutual intention' of the parties.'"""' (*The Travelers Property Casualty Co. of America v. Actavis, Inc.* (2017) 16 Cal.App.5th 1026, 1037 (*Travelers*).) Richland nonetheless emphasizes, as stated in *Travelers*: "'Such intent is to be inferred, if possible, solely from the written provisions of the contract.'" (*Id.* at p. 1038.) Apparently ignoring the "if possible" caveat, Richland asserts that our review of the contract terms must be de novo. In this record, Richland invokes the oft-cited statement that "where '"contract language is clear and explicit and does not lead to absurd results, we ascertain intent from the written terms [of a contract] and go no further.'"'" (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2003) 107 Cal.App.4th 516, 524.)

Richland's central premise is mistaken because the CPA was ambiguous. In reaching this conclusion, we need look no further than the contradiction the trial court identified in the CPA's termination provisions. Section 5.03 provided in seemingly unequivocal terms: "Prior to the expiration of the Review Period, Buyer [i.e., Richland]

shall have the right to terminate this Agreement in its sole and absolute discretion for any reason or none at all." But Section 2.06 contemplated a right of termination for both parties arising only after an "Outside Date" of two years (after the Stage 1 closing) to complete the transfer of the District Property to Richland: "From and after the Outside Date, Buyer and Seller shall each have the right, but not the obligation, to terminate this Agreement upon written notice to the other party . . . ." As the trial court observed, "It would be nonsensical to provide Tracy two years to complete the Stage 2 sale if Richland could cancel the agreement at any time, even the day after the CPA was executed."

The trial court properly admitted extrinsic evidence to interpret the contract. As a preliminary matter, Richland does not cite its contemporaneous objection, if any, to the admission of parol evidence and we find none. (See *Hayter Trucking, Inc. v. Shell Western E&P, Inc.* (1993) 18 Cal.App.4th 1, 20 ["the traditional parol evidence rule allowed extrinsic evidence to give meaning to a writing only when the writing was ambiguous"].) Absent a specific objection below, admitted evidence is competent to support a judgment. (E.g., *Flood v. Simpson* (1975) 45 Cal.App.3d 644, 649.) "'Evidence' is defined broadly to include [ ] *anything* offered in evidence," including parol evidence, all of which "may be considered in support of a judgment." (Evid. Code, § 140, Law Rev. Com. Comment, italics added.) In any event, an internal contradiction in contract language—like those identified by the trial court in Sections 2.06 and 5.03—constitutes an ambiguity justifying the admission of extrinsic evidence to discern the parties' intent. "Extrinsic evidence is admissible . . . to interpret an agreement when a material term is ambiguous." (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1126.)

With the admission of extrinsic evidence, Richland's challenges—all based on construing contract terms in its favor and in textual isolation—must fail. "[T]he scope and standard of [appellate] review depend on whether the trial judge admitted *conflicting* extrinsic evidence to resolve any ambiguity or uncertainty in the contract." (*De Anza*

Enterprises v. Johnson (2002) 104 Cal.App.4th 1307, 1315.) If, as here, the admitted extrinsic evidence is in conflict, then the substantial evidence rule is applied "to the factual findings." (*Ibid.*) So long as there is substantial evidence in the record to support the trial court's factual findings on the meaning and intent of the contract, the appellate court must accept those findings, and "is without power to substitute its deductions for those of the trial court." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 874.)

Here, substantial evidence supported the trial court's decision the parties did not intend to give Richland a unilateral, absolute right to terminate its acquisition of the District Property, and the evidence therefore supports the court's reformation of the contract accordingly. "The purpose of reformation is to correct a written instrument in order to effectuate a common intention of both parties which was incorrectly reduced to writing." (*Lemoge Electric v. County of San Mateo* (1956) 46 Cal.2d 659, 663.) While a party seeking reformation must prove the grounds for that relief by clear and convincing evidence, that standard "applies only at the trial level. Upon review it is assumed that the trial court applied the proper standard, and the judgment will not be upset if there is substantial evidence to support it." (*California Pac. Title Co. v. Moore* (1964) 229 Cal.App.2d 114, 117.)

The trial court found "clear and convincing evidence that the language in Section 5.03 giving Richland the right to terminate the [CPA] at any time 'in its sole and absolute discretion for any reason or none at all' was a mutual mistake of the parties." Civil Code section 3399 provides that, "[w]hen, through . . . mutual mistake of the parties, or a mistake of one party . . . , a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved . . . ." In support of the court's mutual mistake conclusion, witness testimony showed Richland's absolute termination right "was simply carried over from" its initial draft PSA, where it made more sense as applied to "the sale of the entire Tract 14749 property at the same time." In other words, terminating the agreement before closing *on the entire Tract at the*

same time, as originally contemplated before Richland's section 1031 exchange necessitated a change in the timeline, would not substantially harm either party. In contrast, the court explained it would be "unfair absurdity" to continue to vest Richland with an unfettered termination right once the original PSA was revised to permit a two-step sale in which Tracy was obligated to spend "millions to acquire the District Property," yet allegedly "Richland could terminate the PSA, leaving Tracy with the landlocked District Property without entitlements or mitigation land."

Similarly, the court observed it would be "nonsensical" and an "unfair absurdity" the parties never contemplated to provide two years in Section 2.06 to complete the District Property transfer and yet conclude Richland "could cancel the agreement at any time." As the trial court noted, no rational contracting party would allow the other party to "terminate the PSA the day after" the Stage 1 closing, "claim the $6,111,111 principal reduction," and then "turn around and itself purchase the District Property from the District." Nothing in the parties' negotiations suggested such a result was contemplated by either side.

Substantial evidence supports the court's reformation decision. As the court observed, "The parties' negotiations and their 8/18/14 offer and 8/20/14 counter-offer letters demonstrat[e] that the 'staged' sale was not an option" that Richland could terminate at its sole discretion, but instead "expressly gave Tracy time to complete the Stage 2 sale of the District Property . . . which would be completely frustrated by the language mistakenly left in Section 5.03." The court also noted that "Richland's failure to exercise this purported termination right before the two years expired manifests that Richland itself knew Section 5.03 was a mistake and could not be relied upon." Based on the foregoing, substantial evidence supports the court's conclusion that a mutual mistake required reforming the CPA to delete the unintended absolute termination right in Section 5.03.

Because the evidence supports the trial court's mutual mistake finding, we do not address its alternate conclusion that a unilateral mistake on Tracy's part also justified reformation, nor do we address Richland's claim that Tracy's negligence in failing to spot the termination sentence before signing the CPA precluded reformation. We also need not resolve Richland's challenges to the Mutual Agreement the trial court found the parties reached as a "standalone agreement" to resolve the unanticipated development that the District could not sell its property to Tracy.

The trial court found the so-called Mutual Agreement that was manifest in the parties' cooperative efforts to resolve the District's sales restriction was actually "part and parcel of the Note and the CPA." The Mutual Agreement was not a new contract but instead "implement[ed] and fulfill[ed] the parties' express and implied cooperation obligations" in those agreements. Substantial evidence supports the court's conclusion that when Richland stopped cooperating to acquire the District Property, it breached the parties' implied covenant of good faith and fair dealing in the Note and CPA, and breached the CPA's express cooperation terms.

"Every contract contains an implied covenant of good faith and fair dealing providing that no party to the contract will do anything that would deprive another party of the benefits of the contract. [Citations.] The implied covenant protects the reasonable expectations of the contracting parties based on their mutual promises." (*Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 885 (*Digerati*).) The implied covenant is not just a negative restriction, but also has a positive component, requiring the parties to "do everything that the contract presupposes [they] will do to accomplish its purpose." (*Harm v. Frasher* (1960) 181 Cal.App.2d 405, 417.) Because "each party to a contract has a duty to do what the contract presupposes he will do to accomplish its purpose," a party that fails to act and thereby "'prevents fulfillment of a condition of his own obligation . . . cannot rely on such condition to defeat his liability.'" (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 868-869.)

"The essence of the good faith covenant is objectively reasonable conduct." (1 Witkin, Summary of Cal. Law (11th ed. 2017) Contracts, § 825, p. 881.) Breach of the implied covenant does not require breach of an express contract term. (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 372.) "Were it otherwise, the covenant would have no practical meaning, for any breach thereof would necessarily involve breach of some other term of the contract." (*Id.* at p. 373.) Nevertheless, the covenant is shaped by the underlying contract and "cannot '"be endowed with an existence independent of its contractual underpinnings."' [Citation.] It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349-350.) In other words, it applies to enforce "the other party's right to receive the *benefits of the agreement actually made*," not new or different benefits. (*Id.* at p. 349, original italics.)

Because "[a] promissory note is a contract in writing" (*Nicholson v. Smith* (1950) 98 Cal.App.2d 163, 164), the trial court correctly ruled that the implied covenant of good faith and fair dealing applied to the Note. The same is true of the CPA as an ordinary contract (see *Digerati, supra,* 194 Cal.App.4th at p. 885 [every contract includes the good faith covenant]), and the implied good faith covenant in the CPA supplemented that agreement's express cooperation terms. Those terms stated in Section 1 that "Buyer [Richland] shall . . . cooperate with Seller [Tracy] in Seller's efforts to acquire the Property," and in Section 13.11: "Each of the parties shall execute such other and further documents and do such further acts as may be reasonably required to effectuate the intent of the parties . . . ."

The trial court reasonably found that "the purpose of the Note pertaining to the $6,111,111 principal reduction is for Richland to acquire the District Property to complete its ownership of Tract 14749, in return for which Tracy's benefit is receiving the full agreed purchase price for the Transferred Parcels, including full payment of the

$23,672,000 Note . . . ." This purpose is shown in the terms of the Note and in the extrinsic evidence. As the court observed, "the Note itself . . . expressly provides that should Richland not acquire the District Property, it would receive the $6,111,111 principal reduction 'to compensate Maker [i.e., Richland] for the loss in value to the remaining lots that comprise Tract No. 14749.'"

The extrinsic evidence did not demonstrate any intent by either party to sell or buy the tract entitlements and the parcels comprising the approved Tract Map 14749 for any reason other than to complete the described tract development, which required the District Property. The value of the transaction related to the value of the entire tract as a whole, not in its individual parts. Nothing suggested either party would have agreed to the transaction without including the District Property. Indeed, the evidence showed Richland proposed and consented to a staged sale for its own benefit to complete a section 1031 exchange. Substantial evidence supports the trial court's conclusion that "the good faith covenant 'presupposes' that Richland will cooperate with Tracy to acquire the District Property to avoid both the 'loss in value' to Richland [of the tract as a whole] and the price reduction to Tracy."

Richland argues the trial court erred by ignoring language in the CPA, which indicated (as the parties then expected) that Richland would acquire the District Property "from Tracy" and that before Richland's payment and closing obligations for the District Property arose, Tracy's acquisition of the property from the District was an express "condition precedent." Richland suggests the Note similarly included the "from Tracy" and "condition precedent" terms by referring to Richland's planned acquisition of the District Property "pursuant to the Traigh Agreement," another label the parties used for the CPA. As the trial court phrased the argument, "Richland sought to avoid its good faith obligations to cooperate, and [nevertheless] obtain the $6,111,111 principal reduction, by arguing that the reduction is only avoided if Richland purchases the District Property *from Tracy*, and since unexpectedly the District could not sell to Tracy, but only

to Richland, Richland may sit back and obtain the reduction and then buy the property from the District." (Italics added.)

Both the Civil Code and decisional law require a reasonable interpretation of contractual language, "giv[ing] effect to the intent of the parties as it may be interpreted from their entire agreement rather than one which renders the contract void." (*Frankel v. Board of Dental Examiners* (1996) 46 Cal.App.4th 534, 544-545, citing Civ. Code, §§ 1650, 1652, 1655-1656.) "'Courts must give a "'reasonable and commonsense interpretation'" of a contract consistent with the parties' apparent intent.'" (*Department of Forestry & Fire Protection v. Lawrence Livermore National Security, LLC* (2015) 239 Cal.App.4th 1060, 1066.)

The trial court concluded the language on which Richland relies "was included on the assumption that Tracy was best positioned to act as the conduit for Richland's acquiring the District Property from the District. This language is ultimately immaterial; from whom Richland acquired the property—whether from Tracy pursuant to the CPA or a direct purchase from the District—is unimportant. Rather, what is important is that Richland acquire the District Property, regardless of source, to avoid the 'loss in value' to the other parcels it purchased. As such, the immaterial phrase 'pursuant to the Traigh Agreement' should be disregarded."

The court also concluded that the parties made a mutual mistake in assuming the District could transfer the District Property to Tracy, which should not impede their clear intent and contractual obligation to complete the transfer. Observing that cooperation obligations are designed for the parties to meet "unforeseen problems," the court ruled that Richland's implied and express cooperation duties required it to either "acquir[e] the parcel directly from the District, the most efficient solution," or alternatively, "for technical compliance with the CPA (which assumes Tracy would be conveying the parcel to Richland)," Richland could act as a strawman purchaser from the

District, then "convey[] it to Tracy who would in turn convey it to Richland under the CPA, again with the same economics."

The trial court did not err. Language stating or purporting to establish a condition precedent is "strictly construed against" the party seeking to enforce it, particularly where enforcement would result in a forfeiture. (*JMR Construction Corp. v. Environmental Assessment & Remediation Management, Inc.* (2015) 243 Cal.App.4th 571, 594.) "The nonoccurrence of a condition may be excused by 'prevention or hindrance of its occurrence through a breach of the duty of good faith and fair dealing.'" (*R. J. Kuhl Corp. v. Sullivan* (1993) 13 Cal.App.4th 1589, 1601.)

Richland argues that under the contract terms it had no affirmative duty to make a direct purchase from the District; instead, that obligation rested with Tracy. But the purpose of cooperation clauses, express or implied, is for the parties to meet obstacles to fulfill their contracting purpose. For example, in a then-recent case cited by the trial court, the parties' cooperation obligations in a purchase and sale agreement required them to complete the sale because, "[a]t the time the PSA was signed, the exact steps needed to develop [the land] were difficult to predict . . . ." (*Toll Bros., Inc. v. Chang Su-O Lin* (N.D.Cal. May 23, 2012, No. 08-987, SC) (2012 U.S. Dist. Lexis 71972, at *16.)

Such clauses require the parties to sign documents, including deeds, where necessary to effectuate the parties' agreement, though signing such documents is not required by the contract. (*Steiner v. Bank One Indiana, N.A.*, 805 N.E.2d 421, 428-429 (Ind. App. 2004) [retirement benefits disclaimer]; *French v. Foster* (1943) 307 Mich. 361, 365 [quitclaim deed].) Good faith cooperation, as required by the express clauses here and the implied covenant of good faith and fair dealing, may be necessary to "make [the contract] reasonable and avoid absurdities." (*Indemnity Ins. Co. v. Pacific Clay Products Co.* (1970) 13 Cal.App.3d 304, 313.)

Richland offered no explanation as to why a strawman purchase would not fulfill the parties' intent and the technical provisions of the CPA on which it relied.

Instead, Richland simply went "dark" after the District enclosed a Transfer Agreement to complete the sale. Because Richland failed to complete the sale it had agreed to see through to completion, and failed to discuss problems as a prelude to see if they could be overcome, the trial court reasonably found Richland breached its cooperation obligations and the implied good faith covenant. As the trial court concluded, "Otherwise, those obligations would be effectively nullified, and result in the absurdity that Tracy suffer a $6,111,111 principal reduction in the Note to compensate Richland for a loss of its own making, and which it will likely never suffer." Substantial evidence supports the trial court's ruling.

Richland contends the trial court's "Award of $6.1 Million to Tracy . . . Results In An Excessive Recovery" on Tracy's cross-complaint. Richland also argues that Tracy's damages, if any, were limited to $25,000 in liquidated damages under the CPA. This contention has no merit, however, because that provision called for forfeiture of the Buyer's escrow deposit ($25,000) if the Buyer (Richland) terminated the sale after escrow opened, which never occurred because Richland thwarted the sale. Richland cannot invoke in its defense a contract term that became inapplicable through Richland's own breach. Additionally, the liquidated damages provision appears to be an artifact of the parties' original draft PSA calling for the sale of the entire tract at one time. The trial court reasonably could conclude it was mistakenly included or otherwise had no application to Richland's Stage 2 breach.

In any event, Richland misconstrues the $6,111,111 sum as a damages award for Tracy. The trial court did not award Tracy any damages. Instead, the trial court determined Richland was not entitled to that amount in the complaint's prayer for relief because Richland was not entitled to the principal reduction it sought under the Note. The court properly concluded Richland beached its good faith obligations under the Note and the CPA. The court did not err in declining to award Richland damages.

Finally, Richland asserts Tracy was not entitled to judicial foreclosure on the Note because "Tracy is not entitled to the $6.1 million contingent consideration for a sale of the District Property that never occurred." Phrased differently, Richland contends Tracy was not entitled to increase the Note's interest rate from 3.71 percent to 5 percent "based on an imaginary transaction between Richland and the District conjured up by Tracy." Therefore, according to Richland, it was never in default on the Note, thereby invalidating Tracy's notice to Richland accelerating payment of all principal and interest. These claims recycle Richland's arguments that the court erred in finding a breach and erred in failing to declare Richland entitled to the principal reduction. It did not err. The court reasonably found the outside date of the breach occurred months after Richland failed to complete the District Property sale and that Tracy therefore properly accelerated the Note.

DISPOSITION

The judgment and resulting attorney fee order are affirmed. Respondents are entitled to their costs on appeal.

GOETHALS, J.

WE CONCUR:

ARONSON, ACTING P. J.

IKOLA, J.

Aronson, J., concurring:

We affirm the trial court finding Richland breached the express cooperation obligations of the purchase agreement and the implied covenant of good faith and fair dealing by declining to purchase the District Property directly from the District. Richland contends these provisions do not apply here because a direct purchase would have fundamentally altered the terms of the parties' agreement by imposing new obligations on Richland.

Richland correctly points out that the cooperation clauses and the implied covenant furnish no basis to impose new substantive obligations above those in the existing agreement. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349-350 [implied covenant "cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement"].) Richland in its briefs and at oral argument asserted that Tracy's arrangement to have the District sell the District Property directly to Richland would have "stripped" Richland of its 10-day review rights under the CPA which it had "bargained for." This included, according to counsel, the right to conduct a title review and a soils and engineering inspection within that 10-day period, the loss of which imposed new and different risks on Richland and therefore fundamentally altered the initial terms of the agreement.

The argument has no basis in fact. Exhibit number 164 shows the District's proposed sale agreement gave Richland the same 10-day review right it had if Tracy had been the seller. The District also offered Richland the same termination rights it had under the proposed sales agreement with Tracy. Richland provided no other explanation how the District's sale agreement imposed new obligations or risks on Richland. The record, moreover, supports the trial court's conclusion that, after "going dark" instead of completing the deal or stating good faith objections, the objections Richland eventually offered were pretextual—demonstrated again on appeal by the 10-day review period it

never lost. The trial court therefore did not err in concluding Richland breached its cooperation obligations and the implied covenant of good faith.

ARONSON, ACTING P. J.